Idaho Real Estate Commission's

2006 Continuing Education Core Course

Student Course Outline
for the 4-hour course

Effective July 1, 2006
To June 30, 2007

Developed by the
Idaho Real Estate Education Council and
Gail Heist, Don Van Cleave, Phil Burch,
T.J. Angstman, and Justin May

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ATTENDANCE POLICY

Regular attendance means 100% attendance at all sessions of a Prelicense or continuing education (CE) course.

Make-Up Work for Prelicense Courses: If a student misses a portion of a class, makeup work is allowed *only at the discretion of the instructor* to satisfy the attendance requirement. A student may complete makeup work if he or she misses no more than 10% of the scheduled in-class instruction time. A student who misses more than 10% of the course should be dropped from the class. All makeup work must be completed within 30 days of the last day of the course, and the student is not eligible to take the final course exam until all makeup is completed. Makeup work may consist of attendance in the corresponding class sessions in a subsequent offering of the same course, the supervised presentation by audio or video recording of the class sessions missed, or any other assignment deemed appropriate by the instructor.

For a salesperson's license, the applicant will complete 90 hours. For a broker's license, the applicant will complete four specified courses in advance real estate for a minimum of ninety additional hours. To receive credit for Prelicense courses, a student must regularly attend and complete the course (54-2022).
Exam time is NOT included as approved classroom hours of instruction (54-2036(2)(c)).

Make-Up Work for CE Courses: Makeup work is not allowed, except for attendance in the corresponding class session in a subsequent offering of the same course, and *only at the discretion of the instructor*. Consequently, CE providers are compelled to impose stringent attendance standards, and may not award CE credit to a student who missed any portion (even a matter of minutes) of a CE class, unless the student successfully completes the required hours in a subsequent course offering, or completes the challenge CE exam if available. CE providers are charged with the responsibility of enforcing the attendance standard, and have developed various procedures for handling this issue. The Commission obligates providers to take a strict approach.

REQUIRED NOTICE: Providers and instructors of Prelicense and continuing education courses approved in Idaho are required to include this "Attendance Policy" in each approved student course outline for all Prelicense and continuing education courses.

See 54-2004(38), 54-2023(5), 54-2036(2)(g), Idaho Code.

Revised 03/06

PREFACE

COURSE OBJECTIVES

This program is designed by the Idaho Real Estate Commission to provide real estate licensees with a review and an update of selected laws and professional subjects that affect real estate practitioners in Idaho. The course material is not designed to develop technical expertise, but is designed to familiarize licensees with new and changing laws and to review certain selected topics affecting the practice of real estate. The Commission believes that the content in this course will benefit the public interest by providing updated real estate information to real estate practitioners. **It is highly recommended that you complete the Core Course each year.**

While a great deal of care has been taken to provide detailed written reference materials to accompany this program, this material is by no means complete and should not be used as a substitute for competent legal or other professional advice. Personal opinions expressed by the instructors in this course are not necessarily the opinions of the Idaho Real Estate Commission or Education Council. Because the Idaho Real Estate Commission does not design, revise, sell, or approve forms for real estate transactions, any actual forms used herein are as samples only, and used with permission of copyright owners. They are not intended to be an endorsement of any particular form. If the instructor wishes, he/she may provide information concerning the examples used in the case study on the forms generally in use in his/her area of the state.

CREDIT

To receive credit for this course by distance learning methods (video, audio, correspondence, etc.) you MUST pass the Core Course exam on or before June 30, 2007. If you fail the course exam, you may have one opportunity to retake the course exam. If you fail the retake exam, you must repeat the entire course and pass the final exam to receive credit (54-2036). This course and exam will not be offered after June 30, 2007.

It is highly recommended that you complete the Core Course every year!

REAL ESTATE HOT TOPICS

The following are several "hot topics" in the law that touch and concern the real estate professional. The comments herein represent only a brief outline and explanation of the issues and are not intended to be a comprehensive evaluation of the applicable law nor a substitute of competent legal advice. These "hot topics" are intended to be a "heads-up" on issues, problems and trends that are developing or continuing.

Don Van Cleave is the Captain of Investigations for the Idaho State Police. He has 27 years of experience in law enforcement with 21 of those specializing in drug enforcement.

For the PowerPoint presentation on **Meth and Drug Awareness**, please turn to the miscellaneous section of your notebook.

NOTES

IDAPA 16 TITLE 02 CHAPTER 24

16.02.24 - CLANDESTINE DRUG LABORATORY CLEANUP

000. LEGAL AUTHORITY. The Department is authorized to adopt rules under the "Clandestine Drug Laboratory Cleanup Act," Section 6-2604, Idaho Code. (4-11-06)

001. TITLE AND SCOPE.

01. Title. The title of these rules is IDAPA 16.02.24, "Clandestine Drug Laboratory Cleanup". (4-11-06)

02. Scope. (4-11-06)

a. These rules establish the acceptable processes and technology-based standards for the cleanup of clandestine drug laboratories in Idaho. (4-11-06)

b. The rules also establish a program to add and remove residential properties that housed a clandestine drug laboratory from a list maintained by the Department. (4-11-06)

002. WRITTEN INTERPRETATIONS. There are no written interpretations for this chapter of rules. (4-11-06)

003. ADMINISTRATIVE APPEALS AND THE RIGHT TO APPEAL PROPERTY LISTING.

01. Administrative Appeals. Administrative appeals are governed by provisions of IDAPA 16.05.03, "Rules Governing Contested Case Proceedings and Declaratory Rulings". (4-11-06)

02. Appeal of Property Listing. The certification by the reporting law enforcement agency that it is more likely than not that the property has been contaminated through use as a clandestine drug laboratory is prima facie evidence for listing the property on the Clandestine Drug Laboratory Site Property List. (4-11-06)

a. Property Owner's Right to Appeal. The property owner listed on the Clandestine Drug Laboratory Site Property List may appeal the listing by filing a written request for hearing with the Administrative Procedures Section, 10th Floor, 450 West State Street, P.O. Box 83720, Boise, ID 83720-0036, within twenty-eight (28) days of the mailing of the notification by the law enforcement agency. (4-11-06)

b. Burden of Proof. The burden is on the property owner to show, by a preponderance of evidence, that the property has not been contaminated through use as a clandestine drug laboratory. (4-11-06)

004. INCORPORATION BY REFERENCE. There are no documents that have been incorporated by reference into this chapter of rules. (4-11-06)

005. OFFICE HOURS -- MAILING ADDRESS -- STREET ADDRESS -- TELEPHONE -- WEBSITE.

01. Office Hours. Office hours are 8 a.m. to 5 p.m., Mountain Time, Monday through Friday, except holidays designated by the state of Idaho. (4-11-06)

02. Mailing Address. The mailing address for the business office is Idaho Department of Health and Welfare, P.O. Box 83720, Boise, Idaho 83720-0036. (4-11-06)

03. Street Address. The business office of the Idaho Department of Health and Welfare is located at 450 West State Street, Boise, Idaho 83702. (4-11-06)

04. Telephone. The telephone number for the Idaho Department of Health and Welfare is (208) 334-5500. (4-11-06)

05. Internet Website. The Department's internet website is found at http:// www.healthandwelfare.idaho.gov. (4-11-06)

006. CONFIDENTIALITY OF RECORDS AND PUBLIC RECORDS REQUESTS.

01. Confidential Records. Any information about an individual covered by these rules and contained in the Department's records must comply with IDAPA 16.05.01, "Use and Disclosure of Department Records". (4-11-06)

02. Public Records. The Department will comply with Sections 9-337 through 9-350, Idaho Code, when requests for the examination and copying of public records are made. Unless otherwise exempted, all public records in the custody of the Department are subject to disclosure. (4-11-06)

007. -- 009. (RESERVED).

010. DEFINITIONS.

For the purposes of these rules, the following terms are used as defined below: (4-11-06)

01. Certificate of Delisting. A document issued by the Department certifying that a property has met the cleanup standard. (4-11-06)

02. Certify. To guarantee as meeting a standard. (4-11-06)

03. Chain of Custody. A procedure used to document each person that has had custody or control of an environmental sample from its source to the analytical laboratory, and the date and length of time of possession by each person. (4-11-06)

04. Clandestine Drug Laboratory. The area(s) where controlled substances or their immediate precursors, as those terms are defined in Section 37-2701, Idaho Code, have been, or were attempted to be, manufactured, processed, cooked, disposed of, or stored, and all proximate areas that are likely to be contaminated as a result of such manufacturing, processing, cooking, disposing or storing. (4-11-06)

05. Clandestine Drug Laboratory Site Property List. The list, maintained by the Department, of properties that have been identified as clandestine drug laboratories. (4-11-06)

06. Cleanup Contractor. One (1) or more individuals or commercial entities hired to conduct cleanup in accordance with the requirements of this rule. (4-11-06)

07. Cleanup Standard. The technology-based numerical value, established in Section 500 of these rules. (4-11-06)

08. Clearance Sampling. Testing conducted by a qualified industrial hygienist to verify that cleanup standards have been met. (4-11-06)

09. Contamination or Contaminated. The presence of chemical residues that exceed the cleanup standard established in Section 500 of these rules. (4-11-06)

10. Delisted. Removal of a property from the Clandestine Drug Laboratory Site Property List.(4-11-06)

11. Demolish. To completely tear down and dispose of a structure in compliance with local, state, and federal laws and regulations. (4-11-06)

12. Department. The Idaho Department of Health and Welfare. (4-11-06)

13. Discrete Sample. A single sample taken. (4-11-06)

14. Documentation. Preserving a record of an observation through writings, drawings, photographs, or other appropriate means. (4-11-06)

15. Listed. Addition of a property to the Clandestine Drug Laboratory Site Property List. (4-11-06)

16. Methamphetamine. Dextro-methamphetamine, levo-methamphetamine, and any racemic mixture of dextro/levo methamphetamine. (4-11-06)

17. Non-Porous. Resistant to penetration of chemical substances or materials. (4-11-06)

18. Porous. Easily penetrated or permeated by chemical substances or materials. (4-11-06)

19. Qualified Industrial Hygienist. Must be one (1) of the following: (4-11-06)

a. Certified Industrial Hygienist. An individual who is certified in comprehensive practice by the American Board of Industrial Hygiene. (4-11-06)

b. Registered Professional Industrial Hygienist™. An individual who is a registered member of the Association of Professional Industrial Hygienists and possesses a baccalaureate degree, issued by an accredited college or university, in industrial hygiene, engineering, chemistry, physics, biology, medicine, or related physical and biological sciences who has a minimum of three (3) years full-time industrial hygiene experience. A completed master's degree in a related physical or biological science, or in a related engineering discipline, may be substituted for one (1) year of the experience requirement; and a similar doctoral degree may be substituted for an additional year of the experience requirement. (4-11-06)

20. Sampling. A surface sample collected by wiping or blotting a sample media on the surface being sampled. (4-11-06)

21. Technology-Based Standard. A cleanup level based on what is believed to be conservative and protective, while at the same time achievable by currently available technologies. (4-11-06)

22. Vacant. Being without an occupant for the purposes of habitation or occupancy. (4-11-06)

011. -- 099.(RESERVED).

100. POSTING THE CLANDESTINE DRUG LABORATORY SITE. In accordance with Section 6-2605, Idaho Code, the law enforcement agency having jurisdiction is responsible for posting a property with a sign stating that it has been identified as a clandestine drug laboratory. (4-11-06)

101. -- 109.(RESERVED).

110. NOTIFICATION PROCESS. Once a property has been identified as a clandestine drug laboratory, the law enforcement agency having jurisdiction is responsible for initiating notification to the property owner within seventy-two (72) hours using the Department approved form available to law enforcement. (4-11-06)

111. -- 119.(RESERVED).

120. RECORD-KEEPING, LISTING, AND DELISTING A PROPERTY.

01. Listing a Property. Upon notification by a law enforcement agency, using the Department approved form, the Department will place the property on a Clandestine Drug Laboratory Site Property List. No property may be listed unless the reporting law enforcement agency certifies, on the approved form, that it is more likely than not that the property has been contaminated through use as a clandestine drug laboratory. The list will be publicly available online at: http://www.healthy.idaho.gov. (4-11-06)

02. Delisting a Property. When a property is determined by a qualified industrial hygienist to meet the cleanup standard set forth by the Department in these rules, or the property owner submits documentation establishing that the property has been fully and lawfully demolished, the Department will issue the property owner a certificate of delisting. The certificate will include the date the property was listed as a clandestine drug laboratory site and the date the property was delisted. (4-11-06)

03. Voluntary Compliance. When a property owner voluntarily reports his property as a clandestine drug laboratory, the property will be placed on the Clandestine Drug Laboratory Site Property List and will be delisted when the requirements of these rules are met. This action will afford the property owner immunity from civil actions as provided in Section 6-2608, Idaho Code. (4-11-06)

121. -- 199.(RESERVED).

200. RESPONSIBILITIES OF THE PROPERTY OWNER. The owner of a listed property must: (4-11-06)

01. Ensure the Vacancy of the Listed Property. Ensure the property remains vacant until the property is delisted in accordance with Section 120 of these rules; and (4-11-06)

02. Ensure That Cleanup Standards Are Met. (4-11-06) **a.** Ensure that the property is cleaned up to meet the cleanup standards in Section 500 of these rules and have the analytical results certified by a qualified industrial hygienist; or (4-11-06) **b.** Ensure that the property is demolished, in lieu of clean up, as provided for in Section 6-2606, Idaho Code. Demolition and removal of materials must be conducted in compliance with applicable local, state, and federal laws and regulations; and (4-11-06)

03. Provide the Department With a Written Report. Provide the Department with a written report in accordance with Section 600 of these rules. (4-11-06)

201. RESPONSIBILITIES OF THE QUALIFIED INDUSTRIAL HYGIENIST.

01. Qualified Industrial Hygienist Must Conduct Sampling. A qualified industrial hygienist must conduct sampling in accordance with Section 400 of these rules and meet the reporting requirements under Section 600 of these rules. (4-11-06)

02. Qualified Industrial Hygienist Must Be Independent. To prevent any real or potential conflicts of interest, qualified industrial hygienists conducting the sampling must be independent of the company or entity conducting the cleanup or analysis or both. (4-11-06)

202. DEPARTMENT LIST OF QUALIFIED INDUSTRIAL HYGIENISTS. The Department will maintain a list of qualified industrial hygienists on their website at: http:// www.healthy.idaho.gov. (4-11-06)

203. -- 299.(RESERVED).

300.CLEANUP PROCESS.

01. Cleanup Options for the Property Owner. The property owner may choose to hire a cleanup contractor or conduct the cleanup himself. Cleanup must be conducted to reduce the concentration of methamphetamine to the standard specified in Section 500 of these rules. (4-11-06)

02. Porous Materials Must Be Removed From The Property. Porous materials must be removed from the property unless a qualified industrial hygienist certifies that the porous materials may remain on the property. (4-11-06)

301. DISPOSAL OF CLEANUP WASTE. Waste disposal must be conducted in compliance with applicable local, state, and federal laws and regulations. (4-11-06)

302. -- 399.(RESERVED).

400. CLEARANCE SAMPLING REQUIREMENTS.

01. Qualified Industrial Hygienist Required. Sampling must be conducted by a qualified industrial hygienist to verify that cleanup standards have been met. (4-11-06)

02. General Sampling Procedures. Sample collection must be conducted according to the following minimum requirements: (4-11-06)

a. All sample locations must be photographed, and the photographs must be included in the final report required under Section 600 of these rules. (4-11-06)

b. All sample locations must be shown on a floor plan of the property, and the floor plan must be included in the final report required under Section 600 of these rules. (4-11-06)

c. All samples must be obtained, preserved, and handled in accordance with professional standards for the types of samples and analytical testing to be conducted under the chain of custody protocol. (4-11-06)

d. Samples must be analyzed by a laboratory certified by the U.S. Environmental Protection Agency or accredited by the American Industrial Hygiene Association laboratory accreditation program. (4-11-06)

e. All sampling locations must be numerically identified and the numbered sampling locations must be delineated on the floor plan, visible in photographs, and linked to samples. (4-11-06)

f. Whatman 40 ashless filter paper or equivalent must be used for all sampling. The filter paper must be wetted with analytical grade methanol, ethanol or

distilled/deionized water. The filter paper must be blotted or wiped at least five (5) times in two (2) perpendicular directions within each sampling area. (4-11-06)

g. After sampling, the sample must be placed in a new, clean sample jar and sealed with a Teflon-lined lid. The sample jar must be properly labeled with at least the site or project identification number, date, time, and actual sample location. The sample jar must be handled according to professional standards. (4-11-06)

h. Discrete sampling must be used in areas expected to have the highest levels of contamination, as identified on the Department approved form. A ten (10) centimeter by ten (10) centimeter area (one hundred square centimeters (100 cm^2), or approximately sixteen (16) square inches) must be sampled from non-porous surfaces such as floors, walls, appliances, sinks, or countertops in each room. The sample area must be composed of no fewer than three (3) discrete samples. (4-11-06)

i. All other rooms of the property with lowest levels of contamination must be sampled using one (1) discrete sample per room. (4-11-06)

j. A ten (10) centimeter by ten (10) centimeter area (one hundred square centimeters (100 cm^2), or approximately sixteen (16) square inches) must be sampled from the ventilation system in a location to be determined by the qualified industrial hygienist. (4-11-06)

401. -- 499.(RESERVED).

500.CLEANUP STANDARDS.

01. Cleanup Standard for Methamphetamine. A level of methamphetamine that does not exceed a concentration of point one (0.1) micrograms per one hundred (100) square centimeters (0.1 µg/100 cm^2) as demonstrated by clearance sampling conducted by a qualified industrial hygienist. (4-11-06)

02. Other Cleanup Standards. Standards may be established for the cleanup of other controlled substances found in clandestine drug laboratories on a case by case basis, based on an inventory of chemicals found, and after consultation with the Department, the property owner, law enforcement, and a qualified industrial hygienist. (4-11-06)

501. -- 599.(RESERVED).

600. REPORTING REQUIREMENTS. In order for the property to be delisted, the property owner must provide the Department with an original or certified copy of the final report from the qualified industrial hygienist. The final report must include at least the following information: (4-11-06)

01. Property Description. The property description including physical street address (apartment or motel number, if applicable), city, zip code, legal description, ownership, and number and type of structures present. (4-11-06)

02. Documentation of Clearance Sampling Procedures. Documentation of sampling procedures in accordance with the requirements under Section 400 of these rules. (4-11-06)

03. Laboratory Results. Analytical results from a laboratory as specified in Section 400 of these rules. (4-11-06)

04. Qualifications of the Qualified Industrial Hygienist. Qualified industrial hygienist statement of qualifications, including professional certification or documentation. (4-11-06)

05. Signed Certification Statement. A signed certification statement as stating: “I certify that the cleanup standard established by the Idaho Department of Health and Welfare has been met as evidenced by testing I conducted”. (4-11-06)

06. Demolition Documentation. If the property owner chooses to demolish the property, documentation must be provided to the Department showing that the structure was completely and lawfully demolished and disposed of in compliance with local, state, and federal laws and regulations. (4-11-06)

601. -- 999.(RESERVED).

NOTES

TITLE 6
ACTIONS IN PARTICULAR CASES
CHAPTER 26
CLANDESTINE DRUG LABORATORY CLEANUP ACT

6-2601. SHORT TITLE. This chapter shall be known and may be cited as the "Clandestine Drug Laboratory Cleanup Act."

6-2602. PURPOSE. The legislature finds that some residential properties are being contaminated with hazardous chemical residues created by the manufacture of clandestine drugs. Innocent members of the public may be harmed when they are exposed to chemical residues if the residential properties are not decontaminated prior to any subsequent rental, sale or use of the properties. The purpose of this chapter is to protect the public health, safety and welfare by authorizing the department of health and welfare to establish a program providing a process and standards for the cleanup of clandestine drug laboratories.

6-2603. DEFINITIONS. As used in this chapter, unless the context otherwise requires:

(1) "Clandestine drug laboratory" means the areas where controlled substances or their immediate precursors, as those terms are defined in section 37-2701, Idaho Code, have been, or were attempted to be, manufactured, processed, cooked, disposed of or stored, and all proximate areas that are likely to be contaminated as a result of such manufacturing, processing, cooking, disposing or storing.

(2) "Department" means the Idaho department of health and welfare.

(3) "Law enforcement agency" means any policing agency of the state or of any political subdivision of the state.

(4) "Residential property" means any building or structure to be primarily occupied by people, either as a dwelling or as a business, including a storage facility, mobile home, manufactured home or recreational vehicle that may be sold, leased or rented for any length of time. "Residential property" does not include any water system, sewer system, land or water outside of a building or structure.

(5) "Residential property owner" means the person holding record title to residential property, as defined in this section.

6-2604. RULES. The department shall promulgate rules establishing the acceptable process and standards for the cleanup of clandestine drug laboratories. The department shall also promulgate rules establishing a program for addition to, and removal from, a list of residential properties that housed a clandestine drug laboratory.

6-2605. LAW ENFORCEMENT AGENCY RESPONSIBILITY. Following the adoption of rules pursuant to section 6-2604, Idaho Code, and using a format established by the department, a law enforcement agency, upon locating chemicals, equipment, supplies or immediate precursors indicative of a clandestine drug laboratory on a residential property, shall notify the residential property owner and the department.

6-2606. RESIDENTIAL PROPERTY OWNER CLEANUP RESPONSIBILITY. (1) Except as otherwise provided in subsection (2) of this section, and pursuant to rules adopted as provided in this chapter, upon notification to a residential property owner by a law enforcement agency that chemicals, equipment, supplies or immediate precursors indicative of a clandestine drug laboratory have been located on the owner's residential property, the residential property owner shall meet the cleanup standards established by the department. The residential property shall remain vacant from the time the residential property owner is notified, in accordance with rules adopted as provided in this chapter, of the clandestine drug laboratory until such time as the residential property owner has received a certificate issued by the department evidencing that the cleanup standards have been met.

(2) A residential property owner may, at his or her option, elect to demolish the residential property instead of meeting the cleanup standards established by the department.

6-2607. RESIDENTIAL PROPERTY OWNER IMMUNITY. Once a residential property meets the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, the residential property owner and any representative or agent of the residential property owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs.

6-2608. VOLUNTARY COMPLIANCE. Any residential property owner who chooses to voluntarily and successfully accomplish the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, whether or not such owner was notified by a law enforcement agency, shall be afforded the protections from civil actions provided in section 6-2607, Idaho Code.

NOTES

Phil Burch currently serves as a Compliance Officer for the Quality Assurance Division, Santa Ana Homeownership Center, U.S. Department of Housing and Urban Development. Phil began his service with the Federal Government in 1971 and completed 35 years of service in February of this year. He joined HUD's Boise field office in 1985 where he has served as an Underwriter, Chief of Housing Development, Senior Underwriter and is currently assigned as a Compliance Officer with the Office of Lender Activities and Program Compliance. As a Compliance Officer, Phil performs both on-site and desk audits of HUD approved mortgagees to ensure compliance with HUD's policies and programs.

Phil also served a combination of active and reserve military duty with the Army. He retired from the Army Reserve in February 2004 with the rank of Colonel.

NOTES

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT WASHINGTON, D.C. 20410-8000

OFFICE OF THE ASSISTANT SECRETARY
FOR HOUSING-FEDERAL HOUSING COMMISSIONER

May 22, 2003

MORTGAGEE LETTER 2003-07

TO: ALL APPROVED MORTGAGEES
ALL FHA ROSTER APPRAISERS

SUBJECT: Prohibition of Property Flipping

On May 1, 2003, the Department of Housing and Urban Development published a final rule in *The Federal Register* amending the mortgage insurance regulations to prevent the practice of flipping on properties that will be financed with Federal Housing Administration (FHA) insured mortgages. Property flipping is a practice whereby a recently acquired property is resold for a considerable profit with an artificially inflated value, often abetted by a lender's collusion with the appraiser. These changes to existing credit policies, in effect for all mortgage loan applications signed on or after June 2, 2003, will eliminate the most egregious examples of predatory flips of properties within the FHA mortgage insurance programs and, thus, preclude home purchasers using FHA financing from becoming victims of predatory flipping activity.

This Mortgagee Letter provides a synopsis of the final rule, as well as specific guidance to assist lenders in complying with these new requirements. We urge mortgage lenders and appraisers to review the entire published final rule as well.

Highlights of Final Rule

The final rule requires that: a) only owners of record can sell properties that will be financed using FHA insured mortgages; b) any re-sale of a property may not occur 90 or fewer days from the last sale to be eligible for FHA financing; and c) that for re-sales that occur between 91 and 180 days where the new sales price exceeds the previous sales price by 100 percent or more, FHA will require additional documentation validating the property's value. In addition, the rule provides flexibility for FHA to examine and require additional evidence of appraised value when properties are re-sold within 12 months.

Sale by Owner of Record

To be eligible for a mortgage insured by FHA, the property must be purchased from the owner of record and the transaction may not involve any sale or assignment of the sales contract. This requirement applies to all FHA purchase money mortgages regardless of the time between re-sales.

The mortgage lender must obtain documentation verifying that the seller is the owner of record and submit this to HUD as part of the insurance endorsement binder; it is to be placed behind the appraisal on the left side of the case binder. This documentation may include, but is not limited to, a property sales history report, a copy of the recorded deed from the seller, or other documentation such as a copy of a property tax bill, title commitment or binder, demonstrating the seller's ownership of the property and the date it was acquired.

Re-sales Occurring 90 Days or Less Following Acquisition

If a property is re-sold 90 days or fewer following the date of acquisition by the seller, the property is not eligible for a mortgage insured by FHA. FHA defines the seller's date of acquisition as the date of settlement on the seller's purchase of that property. The re-sale date is the date of execution of the sales contract by the buyer that will result in a mortgage to be insured by FHA.

As an example, a property acquired by the seller is not eligible for a mortgage to be insured for the buyer unless the seller has owned that property for at least 90 days. The seller must also be the owner of record.

Re-sales Occurring Between 91 and 180 Days Following Acquisition

If the re-sale date is between 91 and 180 days following acquisition by the seller, the lender is required to obtain a second appraisal made by another appraiser *if* the resale price is 100 percent or more over the price paid by the seller when the property was acquired.

As an example, if a property is re-sold for $80,000 within six months of the seller's acquisition of that property for $40,000, the mortgage lender must obtain a second independent appraisal supporting the $80,000 sales price. The mortgage lender may also provide documentation showing the costs and extent of rehabilitation that went into the property resulting in the increased value but must still obtain the second appraisal. The cost of the second appraisal may not be charged to the homebuyer.

FHA also reserves the right to revise the re-sale percentage level at which this second appraisal is required by publishing a notice in the Federal Register.

Re-sales Occurring Between 91 Days and 12 Months Following Acquisition

If the re-sale date is more than 90 days after the date of acquisition by the seller but before the end of the twelfth month following the date of acquisition, FHA reserves the right to require additional documentation from the lender to support the re-sale value if the re-sale price is 5 percent or greater than the lowest sales price of the property during the preceding 12 months. At FHA's discretion, such documentation may include, but is not limited to, an appraisal from another appraiser.

FHA will announce its determination to require the additional appraisal and other value documentation, such as an automated valuation method (A VM), through a Federal Register issuance. This requirement may be established either nationwide or on a regional basis, at FHA's discretion.

Exceptions to 90-day Restriction

The final rule exempts properties acquired by an employer or relocation agency in connection with the relocation of an employee from the time restriction on re-sales. Re-sales by HUD under its Real Estate Owned (REO) program are not subject to the time restrictions. However, any subsequent re-sale of such a property must meet the 90-day threshold in order for the mortgage to be eligible as security for FHA insurance. The Homeownership Centers (HOCs) do not have the authority to waive the regulatory requirements set forth in the final rule.

The restrictions established by the final rule are not intended to apply when a builder is selling a newly built home or is building a home for a homebuyer wishing to use FHA-insured financing. HUD will more fully address this issue through issuance of the Federal Register notice provided for in § 203.37a(b)(4)(iv) of the final rule.

Date of Property Acquisition Determined by the Appraiser

In addition, mortgage lenders may rely on information provided by the appraiser in compliance with the updated Standard Rule 1-5 of the Uniform Standards of Professional Appraisal Practice (USP AP). This rule requires appraisers to analyze any prior sales of the subject property that occurred within specific time periods, now set for the previous three years for one-to-four family residential properties.

As a result, the information contained on the Uniform Residential Appraisal Report (URAR) describing the Date, Price and Data for Prior Sales for the subject property and the comparables is to include all transactions that occurred within three years of the date of the appraisal. Appraisers are responsible for considering and analyzing any prior sales of the property being appraised and the comparables that occurred within three years of the date of the appraisal.

Therefore, provided that the URAR completed by the appraiser shows the most recent sale of the property to have occurred at least one year previously, no additional documentation is required from the mortgage lender. The mortgage lender remains accountable for verifying that the seller is the owner of record and may rely on information developed by the appraiser for this purpose if provided. However, if the lender obtains conflicting information before loan settlement, it must resolve the discrepancy and document the file accordingly.

Summary of Property Flipping Regulations In Effect June 2, 2003

Prior Sale Occurred	0-90 Days	91-180 Days
Eligibility for FHA financing	**Not Eligible** • Exceptions include relocation agencies and re-sales by employers to employees and sales by HUD of Real Estate Owned. • The HOCs cannot grant exceptions.	**Eligible *provided*:** • Re-sale price to FHA mortgagors is less than 100% greater than previous sale or • If 100% or more greater than previous sale, second appraisal supports value.

If you have any questions regarding this Mortgagee Letter, please contact your Homeownership Center (HOC) in Atlanta (888.696.4687), Denver (800.543.9378), Philadelphia (800.440.8647), or Santa Ana (888.827.5605).

Sincerely,

John C. Weicher
Assistant Secretary for Housing-Federal Commissioner

3/15/06

Consumer contacts on FHA related issues:

FHA Resource Center (800) 225-5342

FHA National Servicing Center: (888) 297-8685

MIP Refund Center: (800) 697-6967

NOTES

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING
FEDERAL HOUSING COMMISSIONER

December 19, 2005

MORTGAGEE LETTER 2005- ML-48

TO: ALL APPROVED MORTGAGEES
ALL APPROVED APPRAISERS

SUBJECT: FHA Repair and Inspection Requirements for existing properties and revisions to FHA Appraisal Protocol

In September 2005, the Federal Housing Administration (FHA) issued Mortgagee Letter 2005-34, which announced the adoption of four of Fannie Mae's revised appraisal reporting forms as well as the release of Revised Appendix D of Handbook 4150.2, CHG-I. This Mortgagee Letter provides additional guidance regarding FHA's repair and inspection requirements for existing properties and the use of the Fannie Mae appraisal reporting forms. All appraisal guidance for new construction that serves as security for FHA-insured mortgages remains unchanged beyond the clarification in the Revised Appendix D that the appraiser may appraise a home that is under construction and that is 90% or more complete without benefit of plans and specifications.

In a continuing effort to reform and standardize its appraisal requirements, FHA has shifted from its historical emphasis on the repair of minor property deficiencies and now only requires repairs for those property conditions that rise above the level of cosmetic defects, minor defects or normal wear and tear. FHA Roster Appraisers are reminded to report **all** readily observable property deficiencies, as well as any adverse conditions discovered performing the research involved in completing the appraisal, within the appraisal reporting form. Lenders should use professional judgment and rely upon prudent underwriting practices in determining when a property condition poses a threat to the safety of an occupant and/or jeopardizes the soundness and structural integrity of the property, such that additional inspections and/or repairs are necessary.

Revisions to the appraisal reporting guidance contained in Chapters 2 and 3 of Handbook 4150.2, CHG-1 are limited to those described in this Mortgagee Letter and Mortgagee Letter 200534 and Revised Appendix D. The specific areas of guidance that are rescinded by this Mortgagee Letter are delineated below. FHA intends to retire and replace Handbook 4150.2, CHG-1 in the near future.

Repair Requirements

As stated in Revised Appendix D, FHA now permits an "as-is" appraisal for existing properties that serve as security for FHA-insured mortgages when minor property deficiencies, which generally result from deferred maintenance and normal wear and tear, do not affect the safety of the occupants or the security and soundness of the property. FHA no longer requires repairs for these types of minor cosmetic deficiencies to bring a property into compliance with FHA Minimum Property Requirements. Specifically, the guidance provided in Handbook 4150.2, CHG1, Chapter 3, Paragraph 3-6, A-7 referencing all-weather road surfaces; Paragraph 3-6, A-8 referencing poor workmanship; Paragraph 3-6, A-ll referencing debris and trash in crawl space; Paragraph 3-6, A-16 referencing steps without a handrail; Paragraph 3-6, C referencing bare floors, badly soiled carpeting and cracked plaster and sheetrock is no longer applicable. Additionally, the guidance provided in Handbook 4905.1, REV -1, Chapter 2, Paragraph 2-7, A-2 referencing all weather road surfaces; Paragraph 2-8 referencing poor workmanship and Paragraph 2-14, C referencing crawl spaces with debris and trash is no longer applicable. Any reference to the Valuation Condition form (form HUD-92564- VC) and protocol for its completion contained in Handbook 4150.2 is no longer applicable as well. Examples of minor property conditions that no longer require automatic repair for existing properties include, but are not limited to:

- Missing handrails
- Cracked or damaged exit doors that are otherwise operable
- Cracked window glass
- Defective paint surfaces in homes constructed post 1978
- Minor plumbing leaks (such as leaky faucets)
- Defective floor finish or covering (worn through the finish, badly soiled carpeting) Evidence of previous (non-active) Wood Destroying Insect/Organism damage where there is no evidence of unrepaired structural damage
- Rotten or worn out counter tops
- Damaged plaster, sheetrock or other wall and ceiling materials in homes constructed post1978
- Poor workmanship
- Trip hazards (cracked or partially heaving sidewalks, poorly installed carpeting)
- Crawl space with debris and trash
- Lack of an all weather driveway surface

Examples of property conditions that may represent a risk to the health and safety of the occupants or the soundness of the property for which FHA will continue to require automatic repair for **existing** properties include, but are not limited to:

- Inadequate access/egress from bedrooms to exterior of home
- Leaking or worn out roofs (if 3 or more layers of shingles on leaking or worn out roof, all existing shingles must be removed before re-roofing)
- Evidence of structural problems (such as foundation damage caused by excessive settlement)
- Defective paint surfaces in homes constructed pre-1978
- Defective exterior paint surfaces in home constructed post -1978 where the finish is otherwise unprotected.

Lenders must review the appraisal to determine whether the appraiser has reported any property conditions that will affect the health and safety of the occupants or the security and the soundness of the property and must require immediate repair where the property condition poses a threat to these criteria.

Inspection Requirements

FHA no longer mandates automatic inspections for the fo1lowing items and/or conditions in **existing** properties:

- Wood Destroying Insects/Organisms: inspection required only if evidence of active infestation, mandated by the state or local jurisdiction, if customary to area, or at lender's discretion
- Well (individual water system): test or inspection required if mandated by state or local jurisdiction; if there is knowledge that well water may be contaminated; when the water supply relies upon a water purification system due to presence of contaminants; or when there is evidence of:
  - Corrosion of pipes (plumbing)
  - Areas of intensive agriculture within ¼ mile
  - Coal mining or gas drilling operations within ¼ mile
  - Dump, junkyard, landfill, factory, gas station, or dry cleaning operation within ¼ mile
  - Unusually objectionable taste, sme1l or appearance of well water

(superceding the guidance in Mortgagee Letter 95-34 that requires we1l water testing in the absence of local or state regulations)

- Septic: test or inspection required only if evidence of system failure, if mandated by state or local jurisdiction, if customary to the area, or at lender's discretion
- Flat and/or unobservable roof

Consequently, the guidance provided in Handbook 4150.2, Chapter 3, Paragraph 3-6, A-6 referencing mandatory termite inspections for any structure that is ground level and for any structure where wood touches the ground; Paragraph 3-6, A-5 referencing mandatory well and septic tests; and Paragraph 3-6, A-12 referencing mandatory inspections for a flat roof is no longer applicable. Additionally, the guidance provided in Handbook 4905.1, REV-I, Chapter 2, Paragraph 2-5, B-1 referencing mandatory well water tests is no longer applicable. In cases where well tests are necessary, as described above, FHA's existing testing standards outlined in Chapter 3, Paragraph 36, A-5a. of Handbook 4150.2 remain in effect and supercede Mortgagee Letter 95-34. If the appraiser reports a potential property deficiency that may pose a threat to the safety of the occupants or the security and soundness of the property, the lender will require an inspection of the condition to determine whether repairs are necessary to mitigate or resolve the problem. Examples of conditions that will continue to require automatic inspections include, but are not limited to:

- .Standing water against the foundation and/or excessively damp basements
- Hazardous materials on the site or within the improvements
- Faulty or defective mechanical systems (electrical, plumbing, or heating)
- Evidence of possible structural failure (e.g., settlement or bulging foundation wall)

Additional Changes to Appendix D, Valuation Protocol

As a result of these changes in FHA's repair and inspection requirements for existing properties, Revised Appendix D of Handbook 4150.2, CHG-I has been updated. The following pages in Revised Appendix D have been updated to reflect these changes: 2,4, 19,23,27,50,55, 60,85,92, 112, 116 and 120. Revised Appendix D is attached to this Mortgagee Letter and will be available online at:

http://www.hudclips.org/cgi/index.cgi

Conditional Commitment Form

Mortgagee Letter 2005-34 instructed the mortgagee to provide a copy of the completed form HUD-92800.5B (Conditional Commitment Direct Endorsement Statement of Appraised Value) to the mortgagor at least five business days prior to loan closing. The five-business day delivery date prior to loan closing of the Conditional Commitment form is hereby rescinded and lenders are instructed to ensure that the mortgagor receives either a completed copy of HUD 92800.5B, or a copy of the completed appraisal report, at or before loan closing.

This Mortgagee Letter is effective for all appraisals performed on or after January 1, 2006.

If you have any questions regarding this Mortgagee Letter, please contact your local Homeownership Center (HOC) in Atlanta (888) 696-4687, Denver (800) 543-9378, Philadelphia (800) 440-8647, or Santa Ana (888) 827-5605.

Sincerely,

Brian D. Montgomery
Assistant Secretary for Housing-Federal Housing Commissioner

NOTES

FHA Commissioner
03/28/2006 06:54 AM

To: HQ_HSNG, HSNG Users - Field
cc:
Subject: Housing on the Move-March 28, 2006

HOUSING ON THE MOVE

March 28, 2006

Inside This Issue:

Largest Enforcement Settlement in FHA History

HUD, in conjunction with the HUD Office of Inspector General, the Justice Department and the Office of the Comptroller of the Currency, recently announced a settlement of more than $41 million against mortgage giant, ABN AMRO Mortgage Group, for falsifying documents in several thousand, FHA insured loans.

In 2003, HUD discovered underwriting deficiencies and improper conduct by an ABN employee. The matter was brought to ABN's attention and an internal investigation was launched. It was then discovered that a number of its employees falsely certified that two ABN underwriters had reviewed more than 28,000 loans prior to FHA endorsement when, in fact, they had not. This is a direct violation of FHA rules.

ABN has agreed to pay the U.S. Government $16.85 million and will not submit hundreds of defaulted loans to HUD, saving the FHA insurance fund an estimated $24.35 million in losses. The total value of the settlement agreement is estimated to be more than $41 million.

'This settlement is the result of a lot of tireless dedication, hard work and close coordination on behalf of HUD, the Department's Inspector General and our other federal partners," said Keith E. Gottfried, HUD's General Counsel. "This action demonstrates our steadfast and enduring commitment to making sure HUD's programs are administered in accordance with the letter and intent of the law and are free from fraud and abuse."

"As much as we intend to aggressively expand the FHA program to help even more families realize their American Dream and become homeowners, we will not do so at the expense of the financial soundness, integrity or reputation of the Federal Housing Administration. This settlement is evidence that we will take immediate action if our participating lenders, however large or small, fail to follow our underwriting requirements," added Brian Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

ABN has "direct endorsement authority" to approve FHA-insured loans under the FHA mortgage insurance program, allowing ABN to underwrite loans and submit them to FHA for insurance endorsement. FHA requires that before a lender can submit a loan for endorsement, its underwriters must perform due diligence and make certain certifications, including that the loan meets FHA's underwriting requirements. HUD officials determined that there were potential violations of the False Claims Act and the Program Fraud Civil Remedies Act involving more than 28,000 loans submitted to HUD with false certifications. Loans were submitted with certifications purporting to be signed by one of two underwriters when neither had, in fact, actually signed the certifications nor personally reviewed the loans to determine whether they qualified for FHA insurance.

To further resolve the matter, ABN informed HUD that it has:

- Taken disciplinary action against the executives, managers and other employees responsible for the improper conduct leading to HUD's enforcement action (including the termination of several senior-level employees and the reassignment of others)
- Replaced the entire management structure of the ABN Government Loan Originations
  Group
- Reorganized the entire ABN Mortgage Group
- Placed senior executives in positions of direct authority over, and accountability for, the
  FHA loan program within ABN
- Hired a new senior executive to supervise the government loan underwriters
- Implemented training programs for both the ABN Government Loan Originations Group and the underwriting department on the importance of HUD certifications for FHA-insured loans

Since 1998, HUD's Mortgagee Review Board (MRB), which oversees the performance of lenders participating in FHA insurance programs, has imposed more than $16 million in civil money penalties, and has taken 292 actions that include settlement agreements, suspensions, and withdrawals of approval against FHA lenders. The Mortgagee Review Board has obtained indemnification agreements for close to 1,500 loans, which has resulted in over $50 million in savings to HUD.

Perseverance Pays Off In Houston

Through her dedication and personal commitment as the veteran Settegast Heights Village Apartments Board Chairperson, Yvette Scales has imprinted a community and secured her place in history. As Board Chairperson of this Houston, Texas property since 1998, Scales ensured its successful renovation and public image improvement. The new Neighborhood Networks Learning Center was recently dedicated as, *The Yvette Scales Learning Center*.

Prior to rehabilitation, the J. Allen Management Company became the new management agent, and the Board of Directors, led by Yvette Scales, presented renovation plans to HUD validating safety and sanitary housing requirements for the residents. After commencing work, the property was awarded a $275,000 grant, which funded the renovation of the activities building and provided computers to establish the Learning Center. In addition, the Board recommended three new playground areas designated for

different age groups to have a safe place to play. Each of these areas are closely monitored by security cameras.

Today, the *Yvette Scales Learning Center* provides a multitude of programs for its residents and community members, including GED and computer literacy programs. Some additional programs include children's tutorial programs, free lunch summer programs for children, counseling programs, programs for at-risk children, a National Night Out activity, health fairs, field trips, arts and crafts, and many more.

L to R: Steve Ashley, husband of *Christie Ashley; William (Bill) Fairchild, Board Member, United Church* of *Christ Foundation* of *Houston; Raynold Richardson, Director, Houston Multifamily Housing Program Center; Josh Allen, Property Managing Agent,* J. *Allen Management Co.; Yvette* W. *Scales, Board Member and Chairperson; Christie Ashley, Board Member; and in the center* of *the picture, Marilyn Reyes, Board Member.) All Board Members refer to United Church* of *Christ Foundation* of *Houston.*

The United Church of Christ owns Settegast Heights Village and the current Onsite Service Coordinator is Tyler Jackson, who shares Yvette Scales' steadfast commitment to improving the lives of the residents living at Settegast Heights Village.

"This is a story of personal commitment and leadership that was the key to a successful turnaround for this HUD-assisted property since 1996," said Joshua Allen of the J. Allen Management Company. "Because of her efforts to successfully guide the Board of Directors during the past few years, Settegast Heights Village is today a property the Houston Association of the United Church of Christ can be proud."

FEMA Phone Line Now Has Status Update Capability

FEMA has added a new "Automated Status Update" function to its registration phone line for those who registered for FEMA assistance. Applicants can immediately check the status of their case and basic information about their accounts by using a voice response system. You can get information about:

- Your personal registration
- Your eligibility status

- Your financial compensation
- The appeals process

Here's what you do:

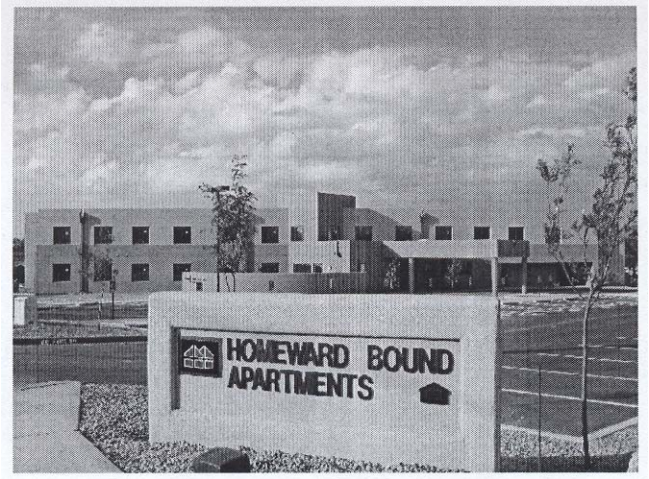
1. Call 1 -800-621 -FEMA
2. Provide your FEMA registration ID number, date of birth and the last four digits of your social security number.
3. You still have the option of talking to a FEMA help line operator.

Santa Fe Disabled Residents Homeward Bound

Santa Fe, New Mexico recently celebrated its newest affordable housing facility built especially for individuals with disabilities. An open house and dedication ceremony commemorated the opening of *Homeward Bound Apartments*, a new, wheelchair accessible apartment community for adults with physical disabilities.

The 20-unit, wheelchair accessible apartment community is the first of its kind in New Mexico. Built by sponsor, owner and property management agent, Accessible Space, Inc. (ASI), Homeward Bound specifically targets adults with physical disabilities. HUD's Section 811 Program was the primary funding source and rent is made affordable with project-based rental assistance, also from HUD.

Residents of Homeward Bound Apartments, representatives from ASI, and guests from a variety of agencies and organizations from Santa Fe and throughout New Mexico all attended the event. Following presentations and a fare of hors d'oeuvres, cake and refreshments, all were invited to tour the property and view one the site's wheelchair accessible apartments.



Homeward Bound Facility in Santa Fe, New Mexico

Guest speakers included Mr. Timothy Hartzer, Acting Field Office Director of the U.S.

Department of Housing and Urban Development (HUD) Albuquerque, New Mexico office, Councilor Karen Heldmeyer from the City of Santa Fe, Ms. Sharon Welsh from Santa Fe Community Housing Trust, and representatives from the Federal Home Loan Bank of Dallas' Affordable Housing Program, New Mexico Mortgage Finance Authority, Senator Jeff Bingaman's office, and from Congressman Tom Udall's office.

Representing Accessible Space, Inc. (ASI) was Mr. Dan Billmark, Director of Real Estate Development, who acknowledged the following agencies and organizations for their funding and support: U.S. Department of Housing and Urban Development Section 811 Program; City of Santa Fe, New Mexico; Federal Home Loan Bank of Dallas' Affordable Housing Program/First National Bank of Santa Fe; Homeward Bound, Inc.; McCune Charitable Foundation; New Mexico Brain Injury Advisory Council; New Mexico Mortgage Finance Authority; and the Santa Fe Affordable Housing Roundtable.

Upcoming Events

http://www.hud.gov/calendar/

HUD Jobs

Listings for positions throughout HUD are posted on the HUD website at www.hud.gov/jobs .
HUD positions are also advertised on USAJobs at http://jobsearch.usajobs.opm.gov/a9hudp.asp .

Contributing Writers: Gloria Garcia, Albuquerque Program Center, People with Disabilities are Homeward Bound in Santa Fe; Mary Frances Byrd, Houston Multifamily Program Center, Perseverance Pays Off in Houston

HOTM welcomes new stories. If you have a story or accomplishment that you would like to share, please submit your articles to the Housing_On_The_Move mailbox.

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Gift Funds. An outright gift of the cash investment is acceptable if the donor is the borrower's relative, the borrower's employer or labor union, a charitable organization, a governmental agency or public entity that has a program to provide homeownership assistance to low- and moderate-income families or first-time homebuyers, or a close friend with a clearly defined and documented interest in the borrower. The gift donor may not be a person or entity with an interest in the sale of the property, such as the seller, real estate agent or broker, builder, or any entity associated with them. Gifts from these sources are considered inducements to purchase and must be subtracted from the sales price. No repayment of the gift may be expected or implied. (As a rule, we are not concerned with how the donor obtains the gift funds provided they are not derived in any manner from a party to the sales transaction. Donors may borrow gift funds from any other acceptable source provided the mortgage borrowers are not obligors to any note to secure money borrowed to give the gift.) This rule also applies to properties of which the seller is a government agency selling foreclosed properties, such as the Veterans Administration or Rural Housing Services. Only family members may provide equity credit as a gift on a property being sold to other family members. These restrictions on gifts and equity credit may be waived by the jurisdictional HOC provided that the seller is contributing to or operating an acceptable affordable housing program.

FHA deems the payment of consumer debt by third parties to be an inducement to purchase. While FHA permits sellers and other parties to make contributions of up to six percent of the sales price of a property toward a buyer's actual closing costs and financing concessions, this policy applies exclusively to the provision of mortgage financing. Other expenses paid on behalf of the borrower must result in a dollar-for-dollar reduction to the sales price. The dollar-for-dollar reduction to the sales price also applies to gift funds not meeting the requirement that the gift be for down payment assistance and is provided by an acceptable source. When someone other than a family member has paid off debts, the funds used to payoff the debt must be treated as an inducement to purchase and the sales price must be reduced by a dollar-for-dollar amount in calculating the maximum insurable mortgage.

Documentation Requirements. The lender must document the gift funds by obtaining a gift letter, signed by the donor and borrower, that specifies the dollar amount of the gift, states that no repayment is required, shows the donor's name, address, telephone number and states the nature of the donor's relationship to the borrower. In addition, the lender must document the transfer of funds from the donor to the borrower, as follows:

1. If the gift funds are in the home buyer's bank account, the lender must document the transfer of the funds from the donor to the home buyer by obtaining a copy of the canceled check or other withdrawal document showing that the withdrawal is from the donor's account. The homebuyer's deposit slip and bank: statement that shows the deposit is also required.

2. If the gift funds are to be provided at closing:

a. If the transfer of the gift funds is by certified check made on the donor's account, the lender must obtain a bank: statement showing the withdrawal from the donor's account, as well as a copy of the certified check.

b. If the donor purchased a cashier's check, money order, official check, or any other type of bank: check as a means of transferring the gift funds, the donor must provide a withdrawal document or canceled check for the amount of the gift, showing that the funds came from the donor's personal account. If the donor borrowed the gift funds and cannot provide documentation from the bank or other savings account, the donor must provide written evidence that those funds were borrowed from an acceptable source, i.e., not from a party to, the transaction, including the lender. "Cash on hand" is not an acceptable source of the donor's gift funds.

> Regardless of when the gift funds are made available to the home buyer, the lender must be able to determine that the gift funds ultimately were not provided from an unacceptable source and were indeed the donor's own funds. When the transfer occurs at closing, the lender remains responsible for obtaining verification that the closing agent received funds from the donor for the amount of the purported gift and that those funds came from an acceptable source.

NOTE: FHA does not "approve" down payment assistance programs in the form of gifts administered by charitable organizations (i.e., nonprofits). Mortgage lenders are responsible for assuring that the gift to the homebuyer from the charitable organization meets the appropriate FHA requirements and the transfer of funds is properly documented. In addition, FHA does not allow nonprofit entities to provide gifts to home-buyers for the purpose of paying off installment loans, credit cards, collections, judgments, and similar debts.

NOTES

T.J. attended BSU and obtained a degree in Business Administration. He has been a real estate licensee since 1990. In 1997 T.J. graduated from University of Idaho with his Juris Doctor. T.J. is the owner of Angstman Law, PLLC, a five attorney law firm with an emphasis in real estate law.

Hot Topics In Real Estate

I. Failure to present offers.

a. Idaho Code §54-2051
   i. "as promptly as practicable, tender to the seller" …
   ii. " and shall obtain the signature of seller or seller's agent verifying time and date such offer was received."

II. Disclosures.

a. Idaho Code §54-2055
   i. Licensees must disclose fact of license "if the licensee directly, indirectly, or through a third party, sells or purchases and interest in real property for personal use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property."
   ii. May not apply to corporations or llcs where licensee is a shareholder or member, but if intent is to own the property personally, it is necessary. Further, as an abundance of caution, just add, "Members/Shareholders of the Buyer are licensed real estate agents in the state of Idaho."
b. Idaho Code §54-2085
   i. "First substantial business contact" – give blue brochure and keep evidence of having done so.
   ii. "Representation Confirmation" – watch for forms that do not contain this information.
c. Idaho Code §54-2086 and 54-2087 (Duties to Customers and Clients)

i. Disclosing adverse material facts actually known or which reasonably should have been known.
    1. Keep PROOF that disclosures were made.

III. Unlicensed Activity

a. Out of State Licensees
    i. Ok to get referral fee.
    ii. Not OK to actually visit the state and act as a broker.
b. Dealers in Options/Lease Purchase Agreements.
    i. Acquiring an option with a view to resell requires a license.

IV. Broker Price Opinions

a. Only the broker or associate broker. §54-4104(5); §54-4105(3)

(3) The provisions of this chapter shall not prohibit a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, whose license is active and in good standing, from rendering a broker's price opinion, for which the broker may charge a fee, provided the broker's price opinion complies with the following requirements:

(a) The broker's price opinion shall be in writing and contain the following:

(i) A statement of the intended purpose of the price opinion;

(ii) A brief description of the subject property and property interest to be priced;

(iii) The basis of reasoning used to reach the conclusion of the price, including the applicable market data and/or capitalization computation;

(iv) Any assumptions or limiting conditions;

(v) A disclosure of any existing or contemplated interest of the broker(s) issuing the opinion;

(vi) The name and signature of the broker(s) issuing the price opinion and the date of its issuance;

NOTES

(vii) A disclaimer that, unless the broker is licensed under the Idaho real estate appraisers act, chapter 41, title 54, Idaho Code, the report is not intended to meet the uniform standards of professional appraisal practice;

(viii) A disclaimer that the broker's price opinion is not intended to be an appraisal of the market value of the property, and that if an appraisal is desired, the services of a licensed or certified appraiser should be obtained.

The broker's price opinion permitted under this chapter may not be used as an appraisal, or in lieu of an appraisal, in a federally related transaction.

b. Does not prohibit CMAs by sales associates, without a fee. §54-4105(2).

V. Depositing Earnest Money with Title Companies

a. Idaho Code §54-2041 and 54-2042. The office must maintain a check register and ledger cards showing which of the title companies the money has been deposited to, and each month must complete a 3 way reconcile just like with a bank. This, of course, necessitates receiving a statement from the title company with information as to what has gone in, come out, and remains.

VI. Tenants in Common Properties

a. Be careful the TIC property you are dealing with is not a “security”.
    i. As new real estate investment vehicles evolve, the industry becomes more accessible to investors and more complicated for real estate professionals. Tenancy-in-Common (TIC) investments are a prime example of this in today’s industry. TICs, which make expensive real estate investments accessible to groups of people who couldn’t afford the investments individually, are complicated because they are treated as both real estate and as securities. The conflicting definitions affect the brokers trying to sell TIC shares and therefore affect the pool of buyers interested in TICs.

ii. Nationally, a TIC sponsor either hires a securities broker/dealer to sell its TIC interests or opens it up to a number of securities broker/dealers to sell the TIC interests. But there is pressure from real estate brokers to make them part of the process. A local company has been paying commissions or referral fees to brokers who secure buyers for TIC property. The Department of Finance considers these the sale of securities and the SEC has also taken this position. Because the SEC or the Idaho Department of Finance deem the TIC a security, a real estate broker would not earn commission on the sale of the individual TIC interests and may be disciplined if a commission is accepted on such a transaction.

VII. Legal Descriptions

a. Discussion re: Crandlemire. If an adequate legal description is not included in the contract, the contract is unenforceable.

NOTES

Idaho Statutes

TITLE 54
PROFESSIONS, VOCATIONS, AND BUSINESSES
CHAPTER 20
IDAHO REAL ESTATE LICENSE LAW

54-2051. OFFERS TO PURCHASE. (1) A broker or sales associate shall, as promptly as practicable, tender to the seller every written offer to purchase obtained on the real estate involved, up until time of closing, and shall obtain the signature of the seller or seller's agent verifying time and date such offer was received. A purchase and sale agreement signed by the prospective buyer shall be deemed in all respects an offer to purchase.

(2) Immediately upon receiving any offer to purchase signed and dated by the buyer and any consideration, a broker or salesperson shall provide a copy of the offer to purchase to the buyer as a receipt.

(3) Upon obtaining a properly signed and dated acceptance of an offer to purchase, the broker or sales associate shall promptly deliver true and legible copies of such accepted offer to both the buyer and the seller.

(4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:

(a) All terms and conditions of the real estate transaction as directed by the buyer or seller;

(b) The actual form and amount of the consideration received as earnest money;

(c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;

(d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;

(e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;

(f) All appropriate signatures; and

(g) A legal description of the property.

(5) All changes made to any offer to purchase or other real estate purchase agreement shall be initialed and dated by the parties to the transaction.

54-2055. LICENSEES DEALING WITH THEIR OWN PROPERTY. (1) Any actively licensed Idaho broker, sales associate, or legal business entity shall comply with this entire chapter when that licensee is buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction.

(2) A licensee shall disclose in writing to any buyer or seller that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal

use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.

(3) Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed.

54-2085. DISCLOSURE AND WRITING REQUIREMENTS -- AGENCY DISCLOSURE BROCHURE AND REPRESENTATION CONFIRMATION. (1) A licensee shall give to a prospective buyer or seller at the first substantial business contact the agency disclosure brochure adopted or approved by the Idaho real estate commission. The commission by motion shall establish the form and contents of the brochure in accordance with the provisions of this chapter. Each brokerage shall keep a signed and dated record of a buyer or seller's receipt of the agency disclosure brochure.

(2) The agency disclosure brochure shall list the types of representation available to a buyer or seller in a regulated real estate transaction, the legal duties and obligations owed to the buyer or seller in each type of representation and a conspicuous notice that no representation will exist absent a written agreement between the buyer or seller and the brokerage.

(3) A brokerage's relationship with a buyer or seller as an agent, nonagent, limited dual agent, or limited dual agent with assigned agents, must be determined and all necessary agreements executed no later than the preparation of a purchase and sale agreement. A brokerage must disclose its relationship to both buyer and seller in any transaction no later than the preparation or presentation of a purchase and sale agreement.

(4) In addition, a purchase and sale agreement, an attachment thereto, or other document drafted in connection with a regulated real estate transaction shall contain the following confirmation of the relationship, whether it involved representation or not, between the buyer, seller and licensees involved:

REPRESENTATION CONFIRMATION AND ACKNOWLEDGMENT OF DISCLOSURE

Check one (1) box in Section 1 below and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

Section 1:

A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).

B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.

C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).

D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Section 2:

A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).

B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.

C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).

D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

(5) The failure of a licensee to timely give a buyer or seller the agency disclosure brochure or the failure of a licensee to properly and timely obtain any written agreement or confirmation required by this chapter shall be a violation of the Idaho real estate license law and may subject the licensee to disciplinary action according to the provisions of sections 54-2058 through 54-2078, Idaho Code.

(6) Neither the commission brochure nor the representation confirmation shall create a brokerage relationship. A separate, signed, written agreement is required for that purpose.

54-2086. DUTIES TO A CUSTOMER. (1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are nonagents and owe the following legal duties and obligations:

(a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;

(b) To perform these acts with honesty, good faith, reasonable skill and care;

(c) To properly account for moneys or property placed in the care and responsibility of the brokerage;

(d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee;

(e) To disclose to the seller/customer all adverse material facts actually known or which reasonably should have been known by the licensee;

(2) A nonagent brokerage and its licensees owe no duty to buyer/customer to conduct an independent inspection of the property for the benefit of that buyer/customer and owe no duty to independently verify the accuracy or completeness of any statement or representation made by the seller or any source reasonably believed by the licensee to be reliable.

(3) A nonagent brokerage and its licensees owe no duty to a seller/customer to conduct an independent investigation of the buyer's financial condition for the benefit of that seller/customer and owe no duty to independently verify the accuracy or completeness of statements made by the buyer or any source reasonably believed by the licensee to be reliable.

54-2087. DUTIES TO A CLIENT. If a buyer or seller enters into a written contract for representation in a regulated real estate transaction, that buyer or seller becomes a client to whom the brokerage and its licensees owe the following agency duties and obligations:

(1) To perform the terms of the written agreement with the client;

(2) To exercise reasonable skill and care;

(3) To promote the best interests of the client in good faith, honesty and fair dealing including, but not limited to:

(a) Disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee;

(b) Seeking a buyer to purchase the seller's property at a price, and under terms and conditions acceptable to the seller and assisting in the negotiation therefor; or

(c) Seeking a property for purchase at a price and under terms and conditions acceptable to the buyer and assisting in the negotiation therefor;

(d) For the benefit of a client/buyer: when appropriate, advising the client to obtain professional inspections of the property or to seek appropriate tax, legal and other professional advice or counsel;

(e) For the benefit of a client/seller: upon written request by a client/seller, requesting reasonable proof of a prospective buyer's financial ability to purchase the real property which is the subject matter of the transaction. This duty may be satisfied by any appropriate method suitable to the transaction or, when deemed necessary by the real estate licensee, by advising the client to consult with an accountant, lawyer, or other professional as dictated by the transaction.

(4) To properly account for moneys or property placed in the care and responsibility of the brokerage; and

(5) To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:

(a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;

(b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;

(c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client

information obtained during the first representation cannot be given to the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;

(d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings.

(6) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property. Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to conduct an independent investigation of either party's financial ability to complete a real estate transaction.

54-4104. DEFINITIONS. As used in this chapter:

(5) "Broker's price opinion" means a written price opinion of the estimated price for identified real property that is prepared by a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, pursuant to the requirements and content provisions for the broker's price opinions contained in this chapter.

54-4105. EXCEPTIONS.

(2) The provisions of this chapter shall not apply to a licensed real estate broker, associate broker or salesperson who, in the ordinary course of his business gives an opinion of the price of real estate for the purpose of a prospective listing or sale, provided that such person does not represent himself as being a state licensed or certified real estate appraiser.

(3) The provisions of this chapter shall not prohibit a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, whose license is active and in good standing, from rendering a broker's price opinion, for which the broker may charge a fee, provided the broker's price opinion complies with the following requirements:

(a) The broker's price opinion shall be in writing and contain the following:

(i) A statement of the intended purpose of the price opinion;

(ii) A brief description of the subject property and property interest to be priced;

(iii) The basis of reasoning used to reach the conclusion of the price, including the applicable market data and/or capitalization computation;

(iv) Any assumptions or limiting conditions;

(v) A disclosure of any existing or contemplated interest of the broker(s) issuing the opinion;

(vi) The name and signature of the broker(s) issuing the price opinion and the date of its issuance;

(vii) A disclaimer that, unless the broker is licensed under the Idaho real estate appraisers act, chapter 41, title 54, Idaho Code, the report is not intended to meet the uniform standards of professional appraisal practice;

(viii) A disclaimer that the broker's price opinion is not intended to be an appraisal of the market value of the property, and that if an appraisal is desired, the services of a licensed or certified appraiser should be obtained.

The broker's price opinion permitted under this chapter may not be used as an appraisal, or in lieu of an appraisal, in a federally related transaction.

54-2041. TRUST ACCOUNTS AND ENTRUSTED PROPERTY. (1) A licensed Idaho real estate broker shall be responsible for all moneys or property entrusted to that broker or to any licensee representing the broker.

(2) Immediately upon receipt, the broker shall deposit entrusted moneys in a neutral, qualified trust fund account, and shall properly care for any entrusted property.

(3) Only moneys relating to a regulated real estate transaction may be deposited in the broker's real estate trust fund account. Entrusted moneys shall not be commingled with moneys of the broker, firm or agent, except for that minimum amount that may be required to open and maintain the trust account or as otherwise allowed by subsection (7) of section 54-2042, Idaho Code.

(4) The real estate broker shall remain fully responsible and accountable for all entrusted moneys and property until a full accounting has been given to the parties involved.

54-2042. CREATION OF NONINTEREST-BEARING TRUST ACCOUNTS -- REQUIREMENTS.

A broker may establish one (1) or more real estate trust accounts but each account must meet all requirements of this chapter, including the following:

(1) Each trust account must be established at an approved depository and must be noninterest-bearing, except as allowed in section 54-2043, Idaho Code, or as otherwise may be provided by law. Approved depositories are state or federally chartered banks and trust companies, state or federally chartered savings and loan associations, properly licensed title insurance companies, or an actively licensed attorney at law.

(2) Each account must be identified by the term "real estate trust account," on checks, deposit slips, and with the depository.

(3) Each trust account must be established and maintained under the licensed business name of the broker, and shall be under the full control of the broker.

(4) Each broker trust account must have a separate and complete set of records, which must consist of a monthly accounting, deposits, charges, and withdrawals or checks, even if the moneys are on deposit with a title company, attorney or other approved depository. The broker is responsible for ensuring that these separate account records are provided by the depository.

(5) Funds deposited in a real estate trust account must be subject to withdrawal on demand at the order or direction of the broker at all times, even if deposited with a title company or other approved depository.

(6) A commission-approved form giving notice of opening a trust account and giving authorization for the commission to inspect the account must be completed for each trust account, signed by the broker and an officer of the bank or depository and returned to the commission.

(7) No deposits to the trust account shall be made of funds that belong to the broker or real estate firm, except that the broker may deposit broker or firm funds for the purpose of opening and maintaining the account and for the payment of anticipated bank service charges for the trust account. In no event shall the balance of broker or firm funds in the account exceed three hundred dollars ($300). Maintenance funds shall not be disbursed for any purpose other than to cover bank charges charged directly to the trust account by the bank.

(8) An entity not specified as an approved escrow depository in subsection (1) of this section, may be accepted and approved by the commission as an escrow depository upon disclosure of the following:

(a) The details of the entity's financial structure;

(b) The amount and terms of errors and omissions insurance and any bonding;

(c) A copy of the entity's last audit and financial statement;

(d) A copy of any license or certificate issued to the entity; and

(e) Any other information that may help the commission make its determination.

NOTES

CASE LAW UPDATE

This update covers cases decided by the Idaho Supreme Court and Court of Appeals from approximately April 2005 through April 2006.

Justin May graduated from the University of Idaho Law School summa cum laude and served as Business Editor for the Idaho Law Review. He spent the first two years after law school as law clerk for Idaho Supreme Court Justice Jesse R. Walters. Following his clerkship, Justin has been in private practice with May, Sudweeks & Browning, LLP. Justin is certified as an instructor by the Idaho Real Estate Commission and has taught courses on Idaho real estate law for Idaho real estate brokers, agents and attorneys.

NOTES

Contracts

***Gillespie v. Mountain Park Estates, L.L.C.*, ___ Idaho ___, ___ P.3d ___ (March 22, 2006).** Plaintiff buyers entered into a contract to purchase a lot in Defendant developer's subdivision. The buyers did not intend to build immediately, but the developer told them that the lots were "hot" and would not be available in a year when buyers intended to build. The buyers were concerned that they would be financially unable to build on the lot in a year. To reassure them, the developer told them that he would buy the lot back if they decided not to build on it.

At closing, the buyers were presented with, and executed, a promissory note that provided for a $5,000 additional payment if another developer was chosen to build the home. The developer told them that this $5,000 payment would not apply if he repurchased the lot as promised.

Buyers decided not build on the lot and requested that the developer buy back the lot. The developer told them that he was not in a financial position to buy the lot back and refused. The buyers sold the lot to another builder. At the developer's request, the escrow agent held back $5,000 and the buyers brought this lawsuit to recover it.

The district court found that the developer had committed fraud and entered judgment in favor of the buyers for $5,000. On appeal, the Idaho Supreme Court determined that the statements made by the developer could not support a fraud claim.

Fraud requires a statement of fact that the speaker knows to be false. Only statements relating to existing facts may constitute fraud. As a general rule, fraud cannot be based simply upon a promise that is not performed. However, there are two exceptions to this general rule: 1) where the promisor did not intend to perform, and 2) where the promise was accompanied by statements of existing fact showing promisor had the ability to perform and those statements were false.

The district court relied upon the second of these two exceptions because there was no evidence that the developer had no intention to buy the lot back when that promise was made. The district court relied solely upon the developers statements that the lots were "hot" and others were interested in purchasing them. The Supreme Court found these statements to be insufficient because it is not enough that statements were made in connection with the promise. Those statements must also be statements of fact that are shown to be false. There was no evidence produced that the statements were false.

NOTES

***Robert Comstock, LLC v. Keybank Nat. Ass'n*, ___ Idaho ___, ___ P.3d ___ (February 23, 2006).** This case involves a series of loan agreements executed between Comstock and Keybank. Comstock claimed that the latest in that series of agreements was obtained through fraud and economic duress. There were two copies of the disputed agreement. The first copy was dated 5/14/02 and contained a provision that Comstock was to receive directly cash proceeds pursuant to a financing agreement with PFI. This copy was not signed by Comstock. The second copy was dated 5/22/02 and contained a change providing that the proceeds from the PFI financing agreement were to be paid to Keybank. This second copy was a redlined copy that clearly showed the change. This second copy was the one executed by Comstock.

The Idaho Supreme Court affirmed a district court ruling in favor of Keybank on this issue because it appeared that Comstock simply failed to read the agreement. Fraud will provide a defense to the enforcement of a contract in this context only when the fraud prevented the complaining party from reading the contract. The voluntary failure to read a written agreement prior to signing will not relieve a party of the obligations in the agreement if the party had the opportunity to read the agreement. Consequently, the Court concluded that "Comstock apparently did not read what he was signing. There is nothing in the record to indicate that KeyBank prevented him from doing so. Comstock's argument for fraud lacks merit." *Id.*

NOTES

Subdivision

***Campbell v. Kildew*, ___ Idaho ___, 115 P.3d 731 (2005).** The district court set aside a judgment confirming an arbitration award between developers that allowed them to subdivide property without complying with the county's subdivision process. The district court also awarded sanctions after concluding that the arbitration was a sham to get around the requirements of the ordinance. The Idaho Supreme Court affirmed.

The Ada County Code (ACC) requires landowners to go through a lengthy process in order to subdivide property. At the time of this case, the ACC contained a number of exceptions including an exception for property subdivided by court order.

The parties to this action formed an LLC for the purpose of developing property in the Boise foothills. The parties executed a Real Estate Development Operating Agreement and each agreed to transfer property to the LLC. The agreement provided that disputes would be resolved through arbitration and that arbitration award were required to be judicially confirmed.

In November 2001, shortly after forming the LLC, but prior to any of the property being transferred to the LLC, the parties hired an engineer to prepare metes and bounds descriptions splitting the property. The parties then hired an arbitrator to arbitrate the dissolution of the LLC. The parties met with the arbitrator and presented him with a proposed arbitration award dividing the property into separate lots consistent with the descriptions prepared by the engineer. The total costs of the arbitration were apparently $50. That same day, the parties conveyed the property to the LLC. The arbitrator signed the arbitration award. The district court issued an order confirming the award on April 16, 2002.

A neighboring land owner filed a collateral challenge to the award alleging that the arbitration was a sham. The district court agreed and found that the judicial confirmation of the award had been obtained through a fraud on the court. The Idaho Supreme Court agreed. The Supreme Court also confirmed sanctions against the parties for their actions in obtaining judicial. In imposing the sactions the district court stated that Campbell and Kildew submitted their petition for the

> "improper purpose of obtaining a Judgment and Decree confirming the arbitration which would permit the petitioners to circumvent the rights of adjacent property owners and the general public" and that "the only purpose of this sham proceeding was to use courts to circumvent the rights of others." According to the district court, "[i]t is certainly not a proper use of the court system to be a means to maneuver around the rights of others for private gain. The actions of the parties tampered with the administration of justice and used an institution which is supposed to guard the personal and property rights of others."

Easements

***Argosy Trust v. Wininger*, ___ Idaho ___, 114 P.3d 128 (2005).** In this case the district court determined that the Plaintiff Trust had an easement that was ten feet wide. On appeal the Trust argued that the easement should have been wider because 1) the width of the easement should be what "is reasonably necessary for that general access of any kind to the dominant estate" and ten-feet is insufficient, and 2) the owners of the servient estate had widened the dirt road that crossed the property to twenty feet and therefore there would be no increased to the burden on the servient estate.

The Idaho Supreme Court affirmed the district court's determination of ten feet. The Court found that the Trust failed to recognize the distinction between the purpose for which an easement can be used and the width of the easement. Absent an express limitation in the grant, the use of an easement may be enlarged "so long as the enlargement in use is reasonable and necessary, is consistent with the normal development of the land, and is not unduly burdensome to the servient estate." However, the physical dimensions of the easement cannot be enlarged without increasing the burden on the servient estate. "An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land." In other words, a reasonable increase in traffic is permitted, but an increase of width is not.

The Court also found that the Trust did not appreciate the difference between the physical road and the easement, which is the legal right to use the servient property for ingress and egress. Accordingly, the Court found that the widening of the road by the owner of the servient property did not give the trust additional rights to more of the servient property than contained within the easement. "The fact that the [owners of the servient property] have widened the road on their property to twenty feet does not increase the width of the Trust's easement. The [owners of the servient property's] use of their land does not create any right in favor of the Trust."

NOTES

***Hughes v. Fisher*, ___ Idaho ___, 129 P.3d 1223 (2006).** The Plaintiff Hughes sought a prescriptive easement along a trail across Fisher's property to access the Sun Valley ski resort. For many years residents of the neighborhood used a path over Fisher's property for skiing access. There was no evidence as to whether the neighbors had been given permission to use the path although neither Fisher nor the previous owners of the property objected. When Fisher proposed to develop his property one of the neighbors objected claiming a prescriptive easement. The district court found that the neighbors use was impliedly permissive and that the neighbor had not done anything to distinguish his use from that of the general public.

The Supreme Court affirmed. A prescriptive easement cannot be obtained if the use is with the owner's permission. The general public may not obtain a private prescriptive easement. Consequently, where the claimant for a prescriptive easement is using the property in that same manner as the general public, the claimant can not obtain a prescriptive easement. "In such situations, mere use of the property alone is insufficient to establish a private prescriptive easement; rather, the claimant must perform some independent act signifying to the owner the adverse user's claim." In this case the neighbor failed to show any facts that distinguished his use from the general public.

There was a second lawsuit combined with this case. Fisher owned another piece of property. A previous owner of the property had been granted an express easement that stated "[a]ccess to the lower part of the western side of lot is guaranteed by easement use of thirty feet strip along northern side of adjoining property." However, the property owner that granted the easement and also constructed the home on the property, constructed the driveway with the underlying utilities diagonally across the parcel of property. Thus, the easement described in the deed does not reflect the location of the driveway that the grantor himself constructed. The Supreme Court affirmed the district court's determination that in these circumstances the deed should be reformed to reflect the correct location of the easement.

NOTES

***Christensen v. City of Pocatello*, ___ Idaho ___, 124 P.3d 1008 (2005).** The Christensens and Fairchilds initiated this action to prevent the City of Pocatello from extending its Portneuf Greenway, a biking and walking path, over an unopened road and an easement, both of which traverse their property. The easement that the city proposed to use was originally intended to provide ingress and egress to property described as the Sewer Lagoon property. As the city proposed to use the easement it would be used as a thoroughfare for foot and bike traffic to access and for the benefit of many other parcels.

Faced with an issue of first impression, the Idaho Supreme Court ruled that "[u]nless the terms of the servitude ... provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate." The Court therefore held that the city could not use the easement for access to other property.

NOTES

***Thomas v. Madsen*, ___ Idaho ___, ___ P.3d ___ (March 10, 2006).** This is a case involving an implied easement by prior use. One of the elements that a claimant must prove in order to obtain such an easement is that easement is reasonably necessary to the proper enjoyment of the dominant estate.

The driveway at issue in this case was constructed more than 100 years ago. When constructed the driveway provided the sole access to a feedlot, various outbuildings and adjoining farmland. The Supreme Court in this case considered what constitutes reasonable necessity for the purpose of obtaining an easement by prior use.

> Madsen argues that part of Thomas's property borders the public highway and therefore it was not landlocked. He could have simply built another access road. Because an implied easement from prior use requires only reasonable necessity, not great present necessity, there is no requirement that the dominant estate be landlocked. Thomas testified that because of the wet conditions in his adjoining field much of the year, he would have to build quite a foundation for a new road. The district judge found "that constructing a road of the same quality would require considerable expense and time." (citations omitted)

In this circumstance the Idaho Supreme Court upheld that the district court's determination that the easement was reasonably necessary.

NOTES

Boundaries

***Luce v. Marble*, 142 Idaho 264, 127 P.3d 167 (2005).** Plaintiff Luce purchased a parcel of real property in Nez Perce County. Next to the Luce property was a parcel of property, enclosed by a fence (Parcel A). Parcel A is irregularly shaped and fenced on all sides except the border between parcel A and the Luce Property. The fence was in place when Luce purchased the property, but it is not known who built the fence or why. In 2002, Marble purchased a parcel of property next to the Luce property (the Marble Property). Parcel A is located entirely on the Marble Property.

Luce filed this quiet title action, in part, to obtain title to Parcel A. In addition to adverse possession, Luce made a claim for boundary by acquiescence/agreement based upon the existence of the fence. Marble's deed contains the following language:

> **ALSO,** Grantee has been allowed to make a complete visual inspection of the property and has knowledge as to the past use of the property. Based upon this inspection and knowledge, Grantee is aware of the condition of the property and **GRANTEE SPECIFICALLY ACKNOWLEDGES THAT GRANTEE IS PURCHASING THE PROPERTY IN AN "AS-IS WITH ALL FAULTS" BASIS AND THAT GRANTEE IS NOT RELYING ON ANY REPRESENTATION OR WARRANTIES OF ANY KIND WHATSOEVER FROM GRANTOR AS TO ANY MATTERS CONCERNING THE PROPERTY,** including the physical condition of the property and any defects thereof, the presence of any hazardous substances, waste or contaminants in, on or under the property, the condition or existence of any of the above ground or underground structures or improvements in of or under the property, the condition of title to the property, and the leases, easements or other agreements affecting the property. (emphasis in original)

Before addressing the boundary by agreement issue, the Court first ruled that Luce had no cause of action based upon this language. "Luce cannot rely on this language to prevent Marble from challenging her claim to Parcel A. A grantor can convey nothing more than he or she owns, and ordinarily a grantee acquires nothing more than the grantor owns and can convey."

The Court denied Luce's claim for boundary by agreement based upon the fence. The existence of a long established fence creates two presumptions that aid in proving a boundary by agreement claim. First, the existence of such a fence presumes an agreement fixing that fence line as the boundary. Second, in the absence of evidence to the contrary, there is a presumption that the fence was originally located because of uncertainty or dispute as to the true line. In this case, however, the Court held these presumption to be inapplicable.

> Here, the specific facts of the case prevent this presumption from operating in Luce's favor. The doctrine of boundary by agreement or acquiescence is based on a reasonable assumption implied from

the surrounding circumstances. In our prior cases, we have applied the presumption when it was reasonable to assume from the facts on the ground that at some prior point landowners agreed or acquiesced to a certain location as the boundary between their properties. However, the shape of Parcel A is so irregular and encompasses such a large portion of the Marble property that such an assumption would be unreasonable. Therefore, since Luce cannot rely on this presumption and failed to present any evidence the fence lines surrounding Parcel A settled an actual disagreement or uncertainty, she cannot establish her right to Parcel A through boundary by agreement or acquiescence. (citations omitted)

NOTES

Recording/constructive notice

***Adams v. Anderson*, ___ Idaho ___, 127 P.3d 111 (2005)**. Among other issues, this case addresses the question of whether a record of survey was properly recorded and put subsequent purchasers on notice of its existence. "[A] conveyance provides constructive notice of its contents to subsequent purchasers when it has been acknowledged or proved, and certified, and deposited with the recorder's office." The record of survey was not acknowledged. However, the Court held that it was properly proved and properly recorded.

> The Adams contend the Record of Survey was adequately proven because they have proven the signature of Myers on it. As explained above, both Myers and Oberbillig signed a "Certificate of Property Owners" on the Record of Survey, which states "We, the undersigned, do hereby certify that we are the owners of Lots 2 and 3, Block 1, DuMars Subdivision, and that this lot line readjustment is acceptable." Neither the Adams nor the Andersons maintain these signatures are not genuine. In Myers' affidavit, she explained that both she and Oberbillig signed the Record of Survey so it could be recorded. She also stated that the Record of Survey contained an accurate depiction of the disputed *property she sold to Oberbillig and that she intended the readjustment of the boundary line between them. Based upon this evidence, we hold that the "Certificate of Property Owners" is sufficient proof of execution by the parties. Therefore, the Record of Survey was properly proven prior to its being recorded.

While the Court found that the record of survey provided notice in this case, it also discussed what it referred to as the preferred practice.

> It would obviously be the preferred practice to follow up a lot line adjustment with an exchange of quitclaim deeds, utilizing metes and bounds descriptions so that the change of the boundaries would also be reflected in the index of deeds. However, that is not necessary in this case since Myers and Oberbillig certified on the Record of Survey that they agreed to the lot line readjustment, the portion of Lot 3 that Myers was giving up and Oberbillig was acquiring was clearly identified and described on the Record of Survey, and all subsequent conveyances of both lots were made by reference to lot, block and subdivision.

The Court ultimately determined that the claimants could not be bona fide purchasers because they had both actual and constructive notice of the record of survey.

NOTES

LEGISLATIVE UPDATE 2006

The following outline summarizes legislation that was enacted in the 2006 session of the Idaho Legislature that the author has deemed relevant to the practice of real estate brokerage and real estate law. The legislation is identified by the bill number and the section of the Idaho Code affected by the legislation. Each item of legislation is effective on July 1, 2006, unless otherwise indicated. This outline is only a topical summary, and the reader is advised to review the actual Idaho Code sections for specific information.

Education Council Member Gail Heist has been actively involved in real estate for more than 39 years as a developer, consultant, broker and educator. He is a certified real estate instructor, and is owner/director of the Academy for Real Estate Careers.

1. SB 1360 – IDAHO REAL ESTATE LICENSE LAW
Idaho Code 54-2004 through 54-2036
Effective July 1, 2006

The Commission's annual housekeeping bill is a series of minor changes in license law. It amends existing law relating to Idaho real estate license law to revise definitions; to revise license exam requirements; to revise license exam requirements; to revise language applicable to license expiration and requests for license numbers for licensed students completing courses of instruction; to revise provisions applicable to instructor qualifications; to revise exam retake policy provisions; and to reference waivers or modifications of pre-license requirements.

Definitions added:

(6) "Brokerage representation agreement" means a written contract between a buyer, seller, or both, and a real estate brokerage for agency representation in a regulated real estate transaction.

(7) "Business conduct and office operations course: means, in reference to a real estate course offering, the component of the advanced real estate

course that is required in order to obtain a broker license and that teaches business practices and office operations of the brokerage, including record-keeping, trust account procedures and the laws governing those practices.

Definitions deleted:

"Reciprocal license" definition was deleted from statutes.

License Exams:

(2) Registration for the exam and exam fee. An individual shall register for the exam in a manner authorized by the commission and shall pay at the time of registration the nonrefundable exam fee in an amount established by motion of the commission, not to exceed one hundred dollars ($100).

(4) Failure to appear for the exam or to pass the exam. An individual who fails to appear for the exam or to pass the exam may register to take another exam. The individual must register and submit a new exam fee.

54-2023 CONTINUING EDUCATION REQUIREMENTS.

(a) Renewing license on active status. A license renewing on active status must successfully complete a commission core course, plus sixteen (16) classroom hours of continuing education, on or before the current license expiration date.

(b) Change from inactive to active. Unless the license is within the initial licensing period, a licensee changing from inactive to active license status shall complete a commission core course, plus sixteen (16) classroom hours of continuing education, before he can change to active license status.

Course providers: Course completion lists. Within five (5) working days after conclusion of each course instruction, the provider shall submit to the council or commission an alphabetical list which shall include the names, addresses, and social security numbers **or, if licensed, the license numbers,** of the students completing the course of instruction, ... and the location.

2. HB421aaS – PROPERTY TAX
Idaho Code 63-602G
Effective January 1, 2006 (Retroactive)

To provide that the first **seventy-five thousand dollars ($75,000)** of the **market value** for assessment purposes of the homestead or **fifty percent (50%)** of the market value for assessment purposes of the homestead, whichever is the lesser, shall be exempt from property taxation.

To also define homestead, to provide for certain annual adjustments to the maximum amount subject to property tax exemption. To provide for publication and dissemination of adjustments and to provide that the publication of adjustments shall be exempt from the provisions of the administrative procedure act and to make technical corrections.

EXAMPLE:

Assessed Value	$130,000	Assessed Value	$500,000
Improvements	$100,000	Improvements	$400,000
Land	$ 30,000	Land	$100,000
New Exemption	$ 65,000	New Exemption	$75,000
New Taxable value	$ 65,000	New Taxable value	$425,000

Beginning for tax year 2007, the state tax commission shall publish adjustments to the maximum amount subject to property tax exemption to reflect cost-of-living fluctuations. The adjustments shall effect changes in the amount subject to tax exemption by a percentage equal as near as practicable to the annual increase in the Idaho housing price indexes as determined by the United States office of federal housing enterprise oversight. The state tax commission shall publish the adjustments required by this subsection each and every year the office of federal housing enterprise oversight announces a change in the Idaho housing price index. The adjustments shall be published no later than October 1 of each year and shall be effective for claims filed in and for the following property tax year. The publication of adjustments under this subsection shall be exempt from the provisions of chapter 52, title 67, Idaho Code, but shall be provided to each county and to members of the public upon request and without charge.

3. SB1399 – HOMESTEAD EXEMPTION
Idaho Code 55-1003
Effective March 30, 2006

A homestead may consist of lands, as described in section 55-1001, Idaho Code, regardless of area, but the homestead exemption amount shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in section 55-1001, Idaho Code, or (ii) the sum of **one hundred thousand dollars ($100,000).**

4. HB422 - CIRCUIT BREAKER PROPERTY TAX RELIEF
Idaho Code 63-705
Effective January 1, 2006

Publication of changes in income limitations and property tax reduction amounts. (1) The state tax commission shall publish adjustments to the income limitations, which shall be the greater of: (a) an individual's income as defined in section 63-701, Idaho Code, of not more than twenty-eight thousand dollars ($28,000) per household for tax year 2006, and each tax year thereafter; or (b) one hundred eighty-five percent (185%) of the federal poverty guidelines for a household of two (2) for tax year 2006, and each tax year thereafter.

The lowest limitations shall allow a maximum reduction of **one thousand three hundred twenty dollars ($1,320)** in tax year 2006 and thereafter, or actual property taxes, whichever is less. Each income limitation and reduction amount shall be prorated based on the basic maximum rduction, in practicable increments so that the highest income limitation will provide for a reduction of one hundred fifty dollars ($150), or actual property taxes, whichever is less.

5. HB474 – OCCUPANCY TAX
Idaho Code 63-317
Effective January 1, 2006

There is hereby levied an occupancy tax upon all newly constructed and occupied residential, commercial and **industrial** structures. This bill added industrial structures to the requirement for occupancy tax upon newly constructed and occupied structures.

6. HB781 – PROPERTY TAX NOTICE
Idaho Code 63-902
Effective July 1, 2006

This bill amended property tax notice to provide that school district taxes shall be separately shown on tax notices:

(A) Maintenance and operations
(B) Bond
(C) Supplemental
(D) Other.

Section 63-906 Interim payment account – Any person, upon application to the tax collector, may establish a payment schedule to allow payments **including, but not limited to, monthly or quarterly, in amounts** of at least twenty-five dollars ($25.00) or the balance owing, to be accumulated toward the payment of current or future real or personal property taxes.

7. HB676 - AGRICULTURAL LAND – PLATTING
Idaho Code 63-604
Effective January 1, 2006

If the land qualified for exemption pursuant to section 63-602FF, Idaho Code, in 2005, then the land will qualify in 2006 for the exemption pursuant to section 6-602K, Idaho Code, upon the filing of a statement by the owner with the board of county commissioners that the land will be actively devoted to agriculture pursuant to this section in 2006.

For purposes of this section, the act of platting land actively devoted to agriculture does not, in and of itself, cause the land to lose its status as land being actively devoted to agriculture if the land otherwise qualifies for the exemption under Idaho Code section 63-604.

"Platting" means the filing of the drawing, map or plan of a subdivision or a re-platting of such, including certification, descriptions and approvals with the proper county or city official.

8. SB1400 - SMALL CLAIMS
Idaho Code 1-2208
Effective July 1, 2006

This legislation raised the amount of money or damages or the value of personal property claimed not to exceed **five thousand dollars ($5,000).**

9. HB780 - DEVELOPMENT IMPACT FEES
Idaho Code 67-8206
Effective July 1, 2006

This legislation revised the procedure for the imposition of development impact fees and increases the number of years that a government entity may hold development impact fees before expending them and increase the maximum number of years that collected development impact fees may be held other than fees for wastewater collection, treatment and disposal and drainage facilities.

Procedure for the imposition of development impact fees.
(3) A government entity that seeks to consider adoption, amendment, or repeal of a capital improvement plan shall hold at least one (1) public hearing. The governmental entity shall publish a notice of the time, place and purpose of the hearing or hearings not fewer than fifteen (15) nor more than thirty (30) days before the scheduled date of the hearing, in a newspaper of general circulation within the jurisdiction of the governmental entity.

Earmarking and expenditure of collected development impact fees.
(4) Collected development impact fees must be expended within **eight (8) years** from the date they were collected, on a first-in, first-out basis. A governmental entity may hold the fees for longer than **eight (8)** years if it identifies, in writing:
(a)A reasonable cause why the fees should be held longer than eight (8) years;
(b) An anticipated date by which the fees will be expended but in no event greater than **eleven (11)** years from the date they were collected.

10. HB432 - SMALL LAWSUIT RESOLUTION ACT
Idaho Code Section 2, Chapter 137, Laws of 2002
Effective March 22, 2006

This legislation removed the sunset clause on the Small Lawsuit Resolution Act that was passed and became effective January 1, 2003.

11. HB584 - RESIDENTIAL MORTGAGE PRACTICES
Idaho Code 26-3104
Effective March 22, 2006

Unlawful Acts. (1) Any person, except a person exempt under section 26-3103, Idaho Code, who engages in mortgage brokering or mortgage lending activities without first obtaining a mortgage broker or mortgage lender license in accordance with this chapter, shall be guilty of a felony.
(2) Any person, not exempt under section 26-3103, Idaho Code, who engages in loan origination activities without first obtaining a loan originator license in accordance with this chapter, shall be guilty of a felony.
(3) **No person, except a person exempt under section 26-3103, Idaho Code, shall engage in mortgage brokering activities, mortgage lending activities, or loan origination activities without first obtaining a license from the department in accordance with this chapter.**

12. HB492 -- ANIMAL FEEDING OPERATIONS
Idaho Code 67-6529E
Effective July 1, 2006

To provide that requests by boards of county commissioners for suitability determinations by site advisory teams shall include the actual animal capacity of the facitlity.

67-6529C. DEFINITIONS.:
(1) “CAFO,” Also referred to as “concentrated animal feeding operation” or “confined animal feeding operation,” means a lot or facility where the following conditions are met::
(c) The lot or facility is designed to confine or actually does confine **as many as or more than the numbers of animals specified in any of the following categories: seven hundred (700) mature dairy cows, whether milked or dry; one thousand (1,000) veal calves; one thousand (1,000) cattle other than mature dairy cows or real calves; two thousand five hundred (2,500) swine each weighing fifty-five (55) pounds or more; ten thousand (10,000) swine each weighing less than fifty-five (55) pounds; five hundred (500) horses; ten thousand (10,000) sheep or lambs; or eighty-two thousand (82,000) chickens.**

13. SB1311 ADVERSE POSSESSION
Idaho Code 5-203
Effective July 1, 2006

This legislation relates to limitations of time for an adverse possession. The required time for an adverse possession has been increased from 5 years to 20 years.

NOTES